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Section 10 forbearance offers no easy path to 'Title II Lite'

By Lawrence J. Spiwak, contributor

As the Federal Communications Commission (FCC) struggles to write new net neutrality rules, the agency is coming under increasing political pressure to reclassify broadband Internet access as a "common carrier" telecommunications service under Title II of the Communications Act. To make this radical reversal of policy palatable, many proponents of reclassification argue that the FCC can use its authority under **Section 10 of the Communications Act** to forbear from select portions of the statute. Unfortunately, once the law is properly understood, forbearance isn't the silver bullet that makes Title II reclassification "easy peasy," as they say.

To begin, let's look at the most "innocuous" proposal of the forbearance: i.e., the FCC will reclassify all broadband services as Title II common carrier services, but then forbear from applying the mandatory tariffing requirements of **Section 203**. Presumably, this approach is derived from the FCC's 1996 decision to forbear from mandatory tariffing of non-dominant long distance providers and from the FCC's 1994 decision to forbear from mandatory tariffing of mobile providers.

However, there is one fatal difference between those cases and the current situation. In both the long-distance case and the mobile case, the FCC decided to forbear because it believed that competitive forces would keep rates within the proverbial "zone of reasonableness" and, thus, the requirements of **Section 201** (requiring "just and reasonable" rates) and **Section 202** (prohibiting "unreasonable discrimination") would be satisfied in the absence of a formal tariff. In contrast, the FCC has consistently held, and the D.C. Circuit in *Verizon v. FCC* has affirmed, that broadband service providers (BSPs) are "terminating monopolists" — i.e., they are "dominant" over terminating access to their customers — as justification for imposing net neutrality rules. If the FCC grants forbearance of Section 203 under this set of facts, then the FCC would essentially reverse over 20 years of precedent which holds that competition is a prerequisite for detariffing. While sweeping this precedent under the rug may not seem like a big deal to proponents of reclassification, it is. If the FCC finds that it may grant forbearance of Section 203 in the absence of competition, then the rest of the FCC's efforts to re-regulate the industry (such as its recent efforts to suspend deregulation of special access detariffing or its refusal to grant forbearance from residual unbundling obligations) must fall.

More insidious is the recent proposal by Rep. Henry Waxman (D-Calif.), the ranking Democrat on the powerful House Energy and Commerce Committee. As Waxman concedes, Title II allows for paid prioritization and, as such, "creates precedents that would need to be distinguished." Waxman's solution is as follows: First, the FCC reclassifies broadband Internet access under Title II; second, the FCC forbears from nearly all of Title II — including even Section 201 and Section 202; and finally, having dispensed with Title II — yet presumably retaining common carrier status for broadband — the FCC promulgates a series of "bright line, prophylactic rules" (i.e., a "no blocking" rule, a "no throttling" rule, and a "no paid prioritization" rule) under **Section 706**.

Not so fast.

To forbear under Section 10, the FCC must show that rates will continue to be "just and reasonable" and "not unduly discriminatory." In effect, Section 10 is a mandate that the FCC not forbear from a Title II regulation unless Sections 201 and 202 are satisfied. So, while the FCC may forbear from sections 201 and 202, it cannot forbear from the mandates of sections 201 and 202, and it is these very mandates, not the numbers "201" and "202," that expressly permit the paid prioritization that Waxman seeks so desperately to ban.

Second, while the D.C. Circuit's decision in *Verizon* vastly expanded the FCC's authority under Section 706, the commission's use of Section 706 is not unfettered. In particular, the D.C. Circuit in *Verizon* specifically held that "any regulatory action authorized by Section 706(a) [must] fall within the Commission's subject matter jurisdiction over such communications — a limitation whose importance this court has recognized in delineating the reach of the Commission's ancillary jurisdiction." According to the D.C. Circuit's holding in *Comcast v. FCC*, this means that any use of Section 706 must be tied directly to a specific delegation of authority in "Title II, Title III, or Title VI."

Given this requirement, here's the rub: If you want to use Section 706 as authority, but you have used your Section 10 authority to forbear from all of the pertinent provisions of Title II, then how do you invoke under Section 706 the requisite ancillary authority to a statute that, for legal purposes, is no longer in force?

Simple answer: you can't.

But while there are glaring legal defects in the forbearance proposals discussed above, it's the big picture with a "Title II Lite" that should give everyone a bit of pause. In particular, we need to understand that the claim that aggressive forbearance of Title II will, in Rep. Waxman's words, "help assure broadband providers that the FCC does not plan to regulate the rates of broadband Internet access service" simply is not true. Without the ability to engage in individualized bargaining, any proposed "no blocking," "no throttling" and "no paid prioritization" rules are nothing but "zero price" regulation by another name (which is exactly what the court in *Verizon* found so offensive).

As the FCC openly conceded last May (and the case law confirms), the agency has ample authority to write strong Open Internet rules under Section 706 that can prevent anticompetitive conduct yet are flexible enough not to deter investment. Choosing instead to proceed by reclassification with a gerrymandering of the commission's Section 10 precedent does nothing more than guarantee a third trip to the Courts of Appeal.

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